THE HONORABLE JAMES L. ROBART

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WASHINGTON

MARK A. ARTHUR, CIRILO MARTINEZ, and PARI NAJAFI, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

SALLIE MAE, INC.,

Defendant.

JUDITH HARPER,

Plaintiff/Intervenor,

v.

ARROW FINANCIAL SERVICES, LLC,

Defendant.

Case No. C 10-0198 JLR

DEFENDANT SALLIE MAE, INC.'S MEMORANDUM IN SUPPORT OF PLAINTIFFS' RENEWED MOTION FOR PRELIMINARY APPROVAL

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I. INTRODUCTION

Defendant Sallie Mae, Inc. ("Sallie Mae") submits this memorandum in support of plaintiffs' renewed motion for preliminary approval of the Amended Settlement (the "Renewed Motion").[1] As the Court has instructed, Sallie Mae addresses herein: (a) whether Class Members may properly be "required to provide a non-cellular telephone number" in connection with a Revocation Request form; and (b) "estimates of the maximum amount of damages recoverable in a successful litigation" of this action. (Docket No. 206 at 20:12-21, 23 n.6.) Based on this submission, as well as the arguments and evidence presented by plaintiffs, Sallie Mae requests that the Court grant the Renewed Motion and allow the Amended Settlement to proceed.

II. ARGUMENT

A. The Revocation Request Form Presents No Issue Here.

There is nothing wrong whatsoever with requiring some Class Members to identify a non-cellular telephone number in a Revocation Request form.[2] At the January 5, 2012 hearing on preliminary settlement approval, plaintiff/intervenor Judith Harper ("Harper") argued for the first time that this requirement is improper because, under the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692p (the "FDCPA"), "consumers may request that debt collectors cease all telephone calls …." (Docket No. 206 at 20:16-19.) There is no question that the FDCPA permits consumers to request that "debt collectors," as defined, cease communications with them.[3] The FDCPA simply has no bearing here, however. If a released party, subject to the FDCPA, receives a

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[1] Unless otherwise indicated, defined terms have the meaning assigned to them in the Court's Order Denying Plaintiffs' Motion for Preliminary Approval of Amended Settlement and Denying Intervenor's Motion to Lift Stay. (See Docket No. 206.)

[2] There are two types of Revocation Request forms. One pertains to Class Members who have or had a lending or servicing relationship with Sallie Mae or another released party. The other pertains to Class Members who have not (such as references).

[3] Importantly, Harper fails to note certain limitations on the FDCPA. See 15 U.S.C. § 1692A(6)(A) ("debt collector" does not include "any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor"). Accordingly, the FDCPA does not apply to a creditor, for example, when it is engaged in calling on its own originated loans. Similarly, the term "debt collector" does not include "any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity … concerns a debt which was not in default at the time it was obtained by such person …." 15 U.S.C. § 1692A(6)(F)(iii):

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request to cease communications under the FDCPA, it would be honored in the ordinary course. Class Members' rights under the FDCPA to request a cease and desist, as they existed in the past and will exist in the future, remain completely intact.

Further, setting aside any supposed issue under the FDCPA, certain Class Members are obligated by their promissory notes to keep their telephone information updated with Sallie Mae. For instance, some student loans held by Class Members include an underlying form promissory note that provides: "I will send written notice to you, or any subsequent holder of this Note, within 10 days after any change in my name, address, telephone number or my school enrollment status (Declaration of Lisa M. Simonetti ("Simonetti Decl."), Ex. A at ¶ K (emphasis added).) The Revocation Request merely tracks that obligation, which plainly is rational. A servicer of a student loan must have the information that allows it to attempt to reach its borrower.

In addition, and again setting aside any issue under the FDCPA, for those Class Members who have certain federally guaranteed student loans, Sallie Mae is required by regulation to make telephone calls to the borrowers when those loans are delinquent. The regulation, entitled "Lender Due Diligence in Collecting Guaranty Agency Loans," states, for loans that have reached specified terms of delinquency, "the lender must engage in at least four diligent efforts to contact the borrower by telephone and send at least four collection letters urging the borrower to make the required payments on the loan." 34 C.F.R. § 682.411(d) (emphasis added). Obviously, in order to comply with the regulation, Sallie Mae must possess the borrower's telephone number. The Revocation Request form makes perfect sense.

B. The Settlement Amount Is Fair And Reasonable. An Estimate Of Maximum Recovery Is Not Meaningful In This Unique Case.

"It is well-settled law that a cash settlement amounting to only a fraction of the potential recovery does not per se render the settlement inadequate or unfair." Officers for Justice v. Civil Serv. Comm'n, 688 F.2d 615, 628 (9th Cir. 1982); see also In re Mego Financial Corp., 213 F.3d 454, 459 (9th Cir. 2000) (considering "various estimates of the maximum amount of damages recoverable in a successful litigation"). "This is particularly true in cases … where monetary relief

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is but one form of the relief requested by the plaintiffs. It is the complete package taken as a whole, rather than the individual component parts, that must be examined for overall fairness." Officers for Justice, 688 F.2d at 628. Here, of course, "the primary focus of the Amended Settlement is prospective practice changes." (Docket Nos. 184 at 18:14-15, 206 at 3-4.) Thus, the settlement amount itself is not of paramount importance.

Moreover, here, the Court is presented with a very unique case. Plaintiffs assert a novel legal theory under the Telephone Consumer Protection Act, 47 U.S.C. § 227 et seq. ("TCPA"), which very much involves the risk that, in litigation, the Class Members would recover nothing. As set forth in the Renewed Motion, the Class Members face the prospect of: (1) failing to certify a litigation class; (2) seeing their novel theory defeated, as it was in Moore v. Firstsource Advantage, LLC, No. 07-CV-770, 2011 WL 4345703, *10 (W.D.N.Y. Sept. 15, 2011) (finding that prior express consent under the TCPA may be given at any time in a credit relationship, not just at origination); and/or (3) having to submit their claims to individual arbitration following the United States Supreme Court's decision in AT&T Mobility LLC v. Concepcion, -- U.S. --, 131 S. Ct. 1740 (2011). In fact, courts long have recognized that settlement may not be "unreasonable in light of the perils plaintiffs face" in continuing to litigate their case even where "the total settlement fund is small" in comparison to the possible recovery available after trial. In re Critical Path, Inc., 2002 WL 32627559 at *7 (N.D. Cal. June 18, 2002); see also White v. Experian Information Solutions, Inc., __ F.Supp. 2d __, 2011 WL 2972054, at *8 (C.D. Cal. July 15, 2011) ("Courts therefore should tread cautiously when comparing the amount of a settlement to speculative figures regarding 'what damages 'might have been won' had [plaintiffs] prevailed at trial.'")

Finally, plaintiffs seek damages in the amount of $500 for every autodialed call allegedly made by any released party in violation of the TCPA. On the one hand, the data that would allow for a precise calculation of estimated damages throughout the entire class period does not exist. (Docket No. 193 at 15-16.) On the other hand, even if it did, the calculation would not assist the Court in evaluating the Amended Settlement. Assuming that only one call is at issue with respect to each of the approximately 8,000,000 Class Members, the damages amount would total $4

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billion. Sallie Mae would not settle these claims for any amount approaching such a staggering sum. Sallie Mae also would possess substantial defenses, including based on Due Process concerns, to any such judgment that would be sought in litigation. See, e.g., Bateman v. American Multi-Cinema, Inc., 623 F.3d 708, 723 (9th Cir. 2010) ("[w]e reserve judgment as to whether a showing of 'ruinous liability' would warrant denial of class certification" in an action brought under a federal consumer statute); London v. Wal-Mart Stores, 340 F.3d 1146, 1255 n.5 (11th Cir. 2003) (finding that, where a damages award threatens to destroy a company, it is appropriately considered at class certification stage); White, 2011 WL 2972054, at *8 (finding class action settlement of statutory damages claim to be adequate, in part, where claims raised concern that due process requires a cap on the total amount of statutory damages recoverable); Murray v. GMAC Mortg. Corp., 434 F.3d 948, 954 (7th Cir. 2006) ("An award that would be unconstitutionally excessive may be reduced … after a class has been certified."). Accordingly, the settlement before the Court represents a fair and reasonable compromise of unique and highly contested claims, which provides real and immediate benefits to Class Members.

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III. CONCLUSION

For the forgoing reasons, Sallie Mae respectfully requests that the Court grant plaintiffs' Renewed Motion.

Dated: February 9, 2012

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CERTIFICATE OF SERVICE

I, Lisa M. Simonetti, hereby certify that, on February 9, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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